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(22,878)

SUPREME COURT OF THE UNITED STATES

Reargument at October Term, 1914.

No. 14.

THE GEORGE N. PIERCE COMPANY,
Petitioner.

AGAINST

WELLS FARGO & COMPANY.

SUPPLEMENTAL BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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List of Cases.

(Indexed to names of both parties.)

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POINT I.

In amplification of Point V of petitioner's principal brief. The defendant so renounced its contract of carriage when only half performed by failing to continue and complete the transportation of the salvage after the railroad wreck and fire, and intentionally converting the salvage, as to be debarred from taking advantage of the contract to limit its liability.

This point was argued in the petitioner's principal brief but not stated in just the way that now impresses us as most forcible. The evidence discloses far more than a technical conversion. It shows that there was an intentional non-delivery and breach of the contract of carriage, amounting to an abandonment of the contract.

How the Issue is Raised by the Pleadings.

The complaint alleges that the plaintiff delivered the property to the defendant, and that "the said defendant undertook and agreed * * * to transport safely as common carrier *and to deliver* to Crocker, Woolworth National Bank at San Francisco," said property. That the defendant "failed and neglected to so carry the said property safely, and *wholly failed to deliver the said property* to said Crocker, Woolworth National Bank of San Francisco" (transcript, pages 2-3).

The above, of course pleads the carriers' common law liability. The cause of action is also pleaded in other paragraphs of the complaint *ex delicto* (as gross negligence) and as a breach of

duty imposed by the Carmack amendment of the act to regulate commerce (transcript, pages 3-4).

Now under the system of code pleading prevailing in New York state this was a sufficient, "plain and concise statement of the facts constituting each cause of action without unnecessary repetition" (New York Code of Civil Procedure, § 481, Subdivision 2).

Answering the cause of action for breach of contract, as well as those for negligence and breach of the statutory obligation, the defendant alleged affirmatively as a partial defense the terms of the bill of lading fixing the value at $50.00 ("Fifth", transcript page 7). Also that the failure to declare value and procurance of transportation at the rate applicable to a shipment worth $50.00 created an estoppel to recover more ("Sixth", transcript, page 8).

The plaintiff filed no reply to these affirmative defenses, because under the New York system of pleading, no reply to affirmative defenses is required unless ordered by the Court (Code of Civil Procedure, § 516), and "an allegation of new matter in the answer, to which a reply is not required * * * is to be deemed controverted by the adverse party, *by traverse* or *avoidance as the case requires*" (Code of Civil Procedure, § 522).

Under this rule of pleading it was open to the plaintiff to meet the partial defense based on the bill of lading by either traverse or avoidance. It could deny that the bill of lading contained

any such provision, or it could admit the fact but avoid its effect by showing that for some reason, the defendant was not entitled to take advantage of it. In other words, the plaintiff can take any position which it could have pleaded by a common law replication.

We contend the plaintiff has proved facts in avoidance by showing that the alleged breach of the contract to carry and deliver was due, not to negligent loss or destruction of the property, but to a willful abandonment of the contract of carriage, accompanied by a conversion of the property after it had been damaged in transit.

When it is remembered that this issue of law and fact arises on the implied avoidance of an affirmative defense, rather than on the denial of the allegations of the complaint, it will be perceived that the plaintiff is entitled to urge the point in this court. It is raised by the exception to the direction of a $50.00 verdict and the assignment of that ruling as error. Further, the point that the shipment had been converted, was distinctly brought to the attention of the trial court; first, on the assumption that a cause of action for conversion was stated in the complaint, which is doubtful, and second, "on the further ground that the bill of lading does not contain any stipulation whatever against conversion, although it does contain against loss, damage or destruction" (Transcript, page 49).

Further, under the New York trial practice it is not necessary to ask to go to the jury on specific

questions or at all—the exception to the direction of a verdict is good *if on any theory permissible under the pleadings and proofs a question of fact was presented.* If, as was done here, the plaintiff asks to go to the jury "on all the questions of fact in the case" that is amply sufficient (Transcript, page 49).

> *Witherow vs. Slayback,* 158 N. Y., 649 and cases cited at page 654.
> *Kraus vs. Bierbaum,* 200 N. Y., 130, 133.

We contend, therefore, that the defendant's affirmative defense based on the bill of lading valuation cannot prevail for the reason that the breach of the contract to carry and deliver was due to an abandonment and renunciation of the contract, coupled with a conversion of the damaged property shipped. That the bill of lading provisions "nor in any event shall said company be held liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued" have relation to "loss of or damage to said property" by a fair construction. And that the defendant was not entitled to its affirmative defense based on the contract because it had renounced and abandoned the contract.

The Evidence.

On the trial the following facts were proved, without objection, from which the jury could draw the inference, in the absence of an explanation which was not given, that the defendant inten-

tionally renounced its contract of carriage and converted the salvage.

At Norborne, Missouri, *en route* to San Francisco, through the negligence of the defendant, Wells Fargo & Company's agent, the Railway Company, the train bearing the shipment was wrecked and burnt (Transcript, pages 25-45).

The witness James Berry states (Transcript, pages 27-28):

> "This express car burnt up. I saw the wreck after the fire had consumed these cars * * * I saw what remained of the contents of these cars. I saw iron, trucks, etc.
>
> Q. What was the nature of the iron you saw there? Did it have form?
>
> A. Yes, sir; as well as I noticed it had form all right. * * *
>
> Q. Could you tell from viewing the remains of the contents of the car what had been the contents of the car?
>
> A. It looked to the trucks of a car or some thing of the kind. * * *
>
> Q. When you say there was trucks of the car or something, do you refer to the car-trucks or to trucks of some contents of that car?
>
> A. I am referring to some contents of the car because they were in the center of the car."

The witness Tomlin states (Transcript, page 31):

> "It burnt up the express car in which the automobiles were. I seen four automobiles, as far as I could see. I saw the remains of the automobiles *after the fire had consumed the wooden portions of the machines.* I seen what was left but there wasn't anything *only just the frames.*"

The witness Burge states (Transcript, page 34):

> "As to seeing the contents of any of the cars after the fire had burned them, I saw the rims of wheels, that is all, about twenty inch wheels. I was able to tell from my observation of those wheels, it was an automobile."

The witness George Berry states (Transcript, page 38):

> "The complete contents of this express car burnt. I saw the contents of that car; nothing but *machinery of some kind;* I don't know what."

The defendant offers no explanation of what it did with the salvage.

The Tenable Inferences from the Facts Proved and Failure to Explain Same.

From the foregoing facts the jury could find that after the wreck and the fire there remained the metal parts of the automobiles—engines, body frames, wheel rims. That such salvage would be worth several hundred dollars. That the defend-

ant instead of completing its contract of transportation as well as it could, or at least communicating with the shipper and obtaining instructions as to what it should do with the salvage, elected to renounce its contract altogether, confiscate the salvage and pay the plaintiff fifty dollars.

The Law.

While a carrier keeps within the performance of its contract it has the benefit of any lawful stipulation governing loss or damage of the shipment. If a valuation has been agreed upon in good faith, it governs the recovery in case the carrier through misfortune or neglect loses or causes damage to the shipment.

But, if the carrier in any way renounces the contract of carriage—as by deviating from the route prescribed, abandoning the transportation, or intentionally converting the property—he can take no advantage of limitations of liability contained in the contract. The law will not tolerate that a carrier who has made an advantageous contract as to the value of a shipment, may treat the contract of carriage as an option to buy the property at the value agreed upon. If the carrier could take title to the salvage at the price of fifty dollars, it could have taken title to the goods prior to damage at the same price.

The accident did not terminate the contract of carriage in the absence of a total loss. It is not necessary to inquire why the carrier abandoned the transportation, whether in good or bad faith; enough that it did abandon it.

It was said in *Magnin vs. Dinsmore*, 70 N. Y., 410:

"It would be trifling with contracts deliberately made by shippers and the decisions of our courts, and saying in effect that they could not, by any contract, limit or restrict their common-law liability to hold, that by calling ordinary neglect, from which a loss ensues 'misfeasance' or 'an abandonment of the character of carriers' the limitation was nullified and the full common-liabilities established. The act which will deprive the carrier of the benefit of a contract for limited liability fairly made *must be an affirmative act of wrong-doing*, not merely ordinary negligence in the course of the bailment. *It need not necessarily be intentional wrong-doing*, but the mere omission of ordinary care in the safe-keeping and carriage of goods is not the misfeasance intended by the authorities."

(Italics not in original).

McKahan vs. American Express Co., 209 Mass. 270, is directly in point. The case involved an express shipment of horses. The bill of lading valued them at $75 each and provided that the entire transportation would be made in not to exceed 36 hours, that an attendant representing the owner should accompany and take charge of the horses and be given free transportation.

During the transportation the express company separated the horses from their attendant against the attendant's objection and in consequence the

horses were injured by detention in the cars for a period of 44 hours without being fed or watered. It was held that the carrier's departure from the agreed method of transportation displaced the contract of carriage and released the shipper from all limitations upon the carrier's liability which he agreed to therein, so that he was entitled to recover from the carrier full compensation for his loss.

The following cases were cited and are in accord with the proposition that such an abandonment of the contract by the carrier entitles the shipper at his option to recover the actual value in spite of a stipulation in his contract that the value should not to be taken to exceed a sum named:

> *Sleat vs. Fagg*, 5 B. & Ald., 342.
> *Balian & Sons vs. Joly, Victoria & Co.*, 6 T. L. R., 345.

It was also pointed out that under Lord Esher's decision in *Balian & Sons'* case and the decisions in

> *Joseph Thorley Limited vs. Orchis Steamship Co.*, [1907] 1 K. B., 660

the same principle applies *even though the deviation was not the proximate cause of the damage done.* In the case last cited the deviation had come to an end before the damage was done and there was no connection between the deviation and the damage. And Judge Loring says:

> "We are of opinion that the principle put forward by Lord Esher in *Balian & Sons vs.*

Joly, Victoria, & Co., is the true one and that the effect of a deviation is to do away with the express contract altogether, at least at the election of the shipper. In other words the breach of the express contract of shipment (which takes place when there is a deviation from route or departure from mode method or manner of transportation) is such a breach on the part of the carrier that the shipper can rescind the express contract of shipment on the principle acted upon in *Amos vs. Oakley*, 131 Mass., 413; *Brown vs. Woodbury*, 183 Mass., 279, and *Long vs. Athol*, 196 Mass., 497."

It would seem to follow that it is immaterial here that the abandonment of the contract occurred after the damage had been done by the wreck and fire.

The following is from Judge Loring's opinion in *McKahan vs. American Express Co.*, 209 Mass., 270:

"It is not necessary to decide in the case at bar on what ground the shipper is to recover when the express contract has been thus wholly displaced. It was suggested by Lord Esher in *Balian & Sons vs. Joly, Victoria, & Co.*, that in such a case the shipper recovered on an implied contract arising out of the fact of shipment. On the other hand it was suggested by Holroyd, J. in *Sleat vs.*

Fagg, 5 B. & Ald., 342, 349, that in such a case the carrier had been guilty of a conversion of the goods and was liable in trover but that was not his only remedy."

And other authorities on these points are referred to.

Several New York cases hold that when a deviation does away with the express contract, the carrier's liability remains upon his common-law liability as insurer.

Johnson vs. New York Central R. R., 33 N. Y., 610.

Maghee vs. Camden & Amboy R. R. Tr. Co., 45 N. Y., 514.

Isaacson vs. New York Central & H. R. R. R. Co., 94 N. Y., 278.

This is precisely the theory upon which the plaintiff has pleaded its first cause of action. Only the third cause of action pleads the bill of lading. The first alleges generally that the defendant contracted to carry safely and deliver—in the manner in which it has been customary to plead a carrier's common-law liability.

Let us then summarize this somewhat complex and technical question of pleadings and trial practice thus:

(a) The complaint pleaded common-law liability of the defendant as carrier.

(b) The answer set up limitation of liability by express contract.

(c) By implication of law the plaintiff set up a plea of avoidance, viz.: that the defendant had abandoned the express contract of carriage and therefore, could take no advantage of any part of it.

The several pleas having been made good, the court directs a verdict for the defendant upon its plea (b).

The plaintiff excepts and assigns the rulings as error.

Such exception should be sustained, for the plaintiff has avoided the effect of plea (b) by proving plea (c) and may therefore recover upon plea (a).

POINT II.

Supplementing Point I of petitioner's principal brief. The so-called valuation was void as a contract exempting the carrier from the liability for its negligence imposed by the Carmack amendment.

We desire to lay greater stress on the Carmack amendment; also to call attention to certain cases as authorities, which have been decided or come to our attention since the former argument.

The Carmack amendment (Act Feb. 4, 1887, c. 104, §20, as amended, Act June 29, 1906, c. 3591,

§7, U. S. Comp. Stats. 1913, §8592; 24 Stat. 386, 34 Stat., 593), provides as follows:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

We call attention to these features of the statute:

(1) It prohibits exemption contracts and receipts. This would include bills of lading; it would include partial exemptions as well as complete exemptions; it would include contracts made upon consideration (e. g., a reduced rate), as well as receipts containing exemptions not founded on consideration. This court said in *Railway Co. vs. Carl*, 227 U. S., 639:

"An agreement to relieve such a carrier from part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration."

It seems as if Mr. Justice Lurton in writing this may have had in mind an able opinion of Judge Caldwell of the Tennessee Supreme Court written many years ago, in the case of *Louisville & N. R. Co. vs. Wynn*, 88 Tenn., 320, 14 S. W., 311.

In this case there was no "valuation" but an attempt to limit liability to the sum of $100 for loss of a horse. The horse was worth $800.

Judge Caldwell said:

"Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction, the nice and important question arises, can a stipulation of the latter character stand before the law when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the mare, if not lost or destroyed, can the limitation of its liability to $100 be upheld in the courts, if it should

appear that her death resulted from the negligence of the company, and that she was in fact worth eight times that amount as the jury found her to be? We unhesitatingly answer, 'no.' The carrier cannot by contract excuse itself from liability for the whole nor any part of a loss brought about by its negligence. To our minds it is perfectly clear that the two kinds of stipulation—that providing for total and that providing for partial exemption from liabilty for the consequences of the carrier's negligence--stand upon the same ground and must be tested by the same principles. If one can be enforced the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence but that it may absolve itself from responsibility for one half, three-fourths, seven-eighths, nine-tenths, or ninety-nine-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter it may substantially evade and nullify the law, which says it shall not do the former and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now,

that the common carrier shall be diligent and careful in the transportation of its freight and public policy forbids that it shall throw off that obligation by stipulation for exemption in whole or in part from the consequences of its negligent acts. * * *

"The cases of *Hart vs. Railroad Co.,* 112 U. S., 331; *Graves vs. Railroad Co.,* 137 Mass. 33; *Harvey vs. Railroad Company,* 74 Mo. 539; *Brehme vs. Dinsmore,* 25 Md., 329; *Railroad Co. vs. Sherrod,* 84 Ala., 178, are not at all in conflict with our opinion in this case."

(2) The statute prohibits exemption *rules* and *regulations.* This would include filed tariffs and classifications. Being in conflict with the statute they would be absolutely void.

(3) The statute prohibits exemption contracts receipts, rules and regulations but it does more The language is that no contract, receipt, rule or regulation shall exempt the carrier from the *liability* thereby imposed. And this court has held that the liability *imposed* by the statute is not only the responsibility of an initial carrier for loss, damage or injury caused by a connecting carrier but also the liability of a carrier for its own default; that the whole subject of carrier liability in interstate commerce has been regulated by federal enactment.

Adams Express Co. vs. Croninger, 226 U. S., 491.

So the bald question is presented whether a palpable evasion of an act of Congress can succeed.

If the bill of lading or tariffs and classifications provided that in consideration of a reduced rate the carrier would assume the risk of its negligence to the extent of fifty dollars and the shipper would assume the risk of the carrier's negligence to the extent of the remaining $15,437.06, no one can deny that these void provisions would not exempt the carrier from the liability imposed by the Carmack amendment. But can the result be accomplished by a hollow form of words, stating that $50 is the "valuation" of the shipment, when it appears on the face of the bill of lading itself that $50 does not amount to a tithe of the value?

Lord Mansfield on Evasion by Pretended Valuations.

Lewis vs. Rucker, 2 Burrow, 1167, decided 1761 is a leading case in the law of marine insurance on valued policies. It is a question if the practice of issuing bills of lading containing a valuation clause was not borrowed from the ancient and well nigh universal practice in marine insurance of issuing valued policies. Lord Mansfield said (2 Burrow, at pages 1170-1171):

> "2d obj. The next objection with which this case has been much intangled is taken from this being a valued policy.
>
> "I am a little at a loss to apply the arguments drawn from thence. It is said, 'that a

valued is a *wager* policy (like interest or not interest:) if so, there can be no *average* loss. and the insured can only recover as for a *total* abandoning what is saved, because the value specified is fictitious.'

"Answ. A valued policy is not to be considered as a wager policy, or like 'interest or no interest'; if it was, it would be void by the act of 19 G. 2, c. 37. The only effect of the valuation is *fixing the amount of the prime cost;* just as if the parties *admitted* it at the trial; but in every argument, and for every other purpose, it must be taken that the value was fixed in *such a manner* as that the insured meant only to have an indemnity. * * *

"It is settled, 'that upon valued policies, the merchant need only prove *some* interest to take it out of 19 G. 2, because the adverse party has *admitted* the value; and if more was required, the agreed valuation would signify nothing.' But if it should come out in proof, that a man had insured 2,000 *l.* and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination, that by such an *evasion* the act of parliament may be defeated."

The last sentence determines this case. It is the true converse of this case. Here the statute is against exemptions from liability. There it

was against wager policies. The two extremes meet, overvaluation and undervaluation.

There never has been, except in this case below, and we believe there never will be, a determination that by such an evasion an act of Congress may be defeated.

The idea seems to have been a favorite with Lord Mansfield and he expressed it in another case in the same volume of reports.

Wilson vs. Day, 2 Burrow, 827.

It was held that where a debtor assigned the *whole* of his property, it was an act of bankruptcy. But Lord Mansfield added:

> "That a *colourable exception* of a *small part* of his estate or effects would not keep the matter, for the court would never suffer that *an evasion* should prevail, to take such a case out of the general rule, which is so essentially necessary to be observed, in order to a due execution of this system of laws."

Cases lately Decided by this Court.

Chicago R. I. & Pac. Ry. Co. vs. Cramer, 232 U. S., 490.
Great Northern Ry. Co. vs. O'Connor, 232 U. S., 508,

are in line with *Adams Express Co. vs. Croninger,* 226 U. S., 491, and the other cases discussed on the

petitioner's principal brief, pages 16-23, and need not be distinguished further.

> *Boston & Maine R. R. Co. vs. Hooker,* 233 U. S., 97,

carries the law a step beyond. It holds that the valuation of a trunk shipped as baggage, fixed by the filed tariffs, will govern, although no express agreement as to value existed. The plaintiff made an unsuccessful attempt to bring the case within the principle of the case at bar, but this court said, clearly reserving the point (233 U. S., at pages 113-114):

> "As to the finding that the plaintiff's baggage was apparently worth more than $100, as above set forth, it appears that the contents of the two trunks and suit cases were not disclosed or known to the carrier, and the finding in this respect, necessarily based on the appearance of the baggage, cannot be said to show a procurement of transportation in violation of the requirements of the filed schedules at a rate disproportionate to its known value."

In the case at bar the contents of the shipment were disclosed and known by the carrier. Shipper and carrier stood on an equal footing of knowledge in every respect except perhaps one: the shipper had perhaps a *more exact* knowledge of the value of the shipment than the carrier. We consider the effect of this in the next point.

POINT III.

The defendant's tariffs and classifications were not offered in evidence. But it must be presumed that they contained lawful provisions, and must therefore be presumed that they did not provide for the exemption of the carrier from liability for negligence by means of the practice of undervaluation.

The defendant's tariffs were produced in Court and identified, but were not offered in evidence (Transcript, page 18).

The only testimony bearing on their contents is found in the bill of lading form and the statements by the plaintiff's shipping agent as to his knowledge of the defendant's practices. From the bill of lading we may infer that the tariffs made some provision for the valuation of shipments. But the bill of lading form says nothing about rates or charges according to value (Transcript, page 14). The plaintiff's agent stated that he knew that the defendant "charged for valuation if you placed it on a shipment." "I did not know they charged a higher rate, but I know they charged for valuation" (Transcript, page 23).

What then may we assume on this slender basis that the tariffs contained? Obviously we must assume that they were legal and filed tariffs—that they did not provide for exemptions from liability for negligence.

On the former argument counsel for the defendant took the liberty of going outside the record and calling attention to the defendant's tariffs as

before this Court in the case of ***Wells Fargo & Co. vs. Neiman-Marcus Co.,*** 227 U. S., 469. And he insisted that they contemplated what he termed a system of "optional insurance"; that is, that they contained basic rates depending upon a $50.00 valuation, and left it optional with the shipper either to pay for any additional value of the shipment and leave the risk of the carrier's negligence with the carrier, or refuse to pay anything in addition to the basic rate, and relieve the carrier of any liability above $50.00 value.

But to assume that this is what the filed tariffs contained applicable to the shipment here in question is to assume that the tariffs contained provisions in conflict with the Carmack amendment as well as the common-law. This is true for the reasons well stated by Mr. Justice Lurton in *Railway Co. vs. Carl,* 227 U. S., 639, 650. After pointing out in language which we have quoted that a tariff or agreement providing for a partial exemption would be void the same as one providing for a complete exemption, and that such a contract is no more valid because it rests upon a consideration, *i. e.,* a lower rate, than if it was without consideration, he continues:

> "It follows, therefor, that when the carrier has filed rate sheets which show two rates based upon valuation upon a particular class of traffic, that it is legally bound to apply that rate which corresponds to the valuation."

This must be so. A dilemma is presented. Either the tariff provided that when value is known to exist it must be charged for; or the tariff, by providing that the shipper might undervalue his shipment at will, offended the statutory prohibition of exemptions, partial or complete, by rule or regulation, from liability for negligence.

We insist that the only tariff which we are permitted to assume existed is a legal tariff, one that required that the rate applicable to a shipment worth fifteen thousand dollars should be charged on a shipment worth that amount.

In reply to our contentions along those lines counsel for the defendant made two answers on the former argument.

First, he pointed out that, unlike railroad tariffs, such as were involved in the *Carl* case, the Express Company's tariffs provided for a basic rate varying according to weight and assuming \$50.00 valuation, with increased charges of so many cents for each \$100.00 value additional. And he argued that the express carrier would be in danger of a liability for conversion if it attempted to fix a value for itself and charge accordingly, in case the shipper declined to state the exact value; that the carrier might inadvertently demand an excessive rate.

Second, he argued that the decided cases established that a shipper might value property at any sum it pleased, "for the purposes of the transportation."

These are mistaken contentions. The first is an argument *ab inconvenienti.* If there is a statutory prohibition, and one founded in public policy, against exemptions from carrier's liability for negligence, then any practice of exemption would be void, no matter how great the inconvenience resulting therefrom. But the inconvenience is largely imaginary. Let us test the argument by the facts of the case at bar. The shipper refused to inform the carrier of what it claimed to be the value of the shipment but made full disclosure of its contents and nature. This placed the Express Company in as good a position as any appraiser to estimate its value. Established legal principles would protect the carrier in any *bona fide* valuation it might place upon the shipment for the purpose of fixing the rate for valuation.

(a) The shipper as the consignee's agent having refused to state the value, the consignee would undoubtedly be estopped to dispute the carrier's *bona fide* valuation. The burden would rest upon the shipper, in an action for conversion, to establish that the carrier had unduly exaggerated its valuation for the purpose of extorting an excessive rate.

(b) The carrier could reasonably ask the consignee to state the value, warning him that an understatement would be a violation of law.

(c) The shipper or consignee could not maintain an action for conversion without establish-

ing affirmatively that the rate charged was unreasonable. This would place on him the burden of showing more than that the estimate of value upon which the charge was based was inexact; he would be obliged to show that it was unreasonable.

Illinois Central R. R. Co., vs. Commission, 206 U. S., 441, 464.

(d) The carrier would in no event be placed under any greater difficulty than all carriers had to contend with prior to statutory regulation of rates, in every case where the rate was not expressly agreed upon.

(e) While the act to regulate commerce has largely done away with uncertainties as to carriers' rates and charges, some inconstant elements can never be done away with. Such are questions of value, weight and count. The question of value is of the same genus as the other two—only affected with a somewhat greater degree of uncertainty.

If a carrier, in fixing the filed rate applicable, determines value, weight and count in good faith and to the best of its ability, the courts will give it full protection.

The second contention of the defendant's counsel, that a system of rates permitting undervaluation at will has been necessarily sustained as legal by the line of decisions confining recoveries for negligence to declared values, is also unfounded. All of these cases rest upon a doc-

trine of estoppel (See dissenting opinion of Mr. Justice Lamar in *Boston & Maine R. R. Co., vs. Hooker,* 233 U. S. 97). Even the *Hooker* case rests upon an estoppel, founded on non-disclosure of the value or contents of the baggage and a presumed knowledge of the tariff provisions.

This estoppel has no bearing on the question of what is the legal rate. That may be governed by the actual value, while the measure of recovery may be controlled by the value which the shipper is estopped to deny.

To illustrate: Suppose a shipper expressly declares a package containing $1,000 in gold coin to be worth $50.00 and obtains the rate applicable to a shipment worth $50.00. It is lost through the carrier's negligence. The shipper will recover only $50.00, but he will be liable to a prosecution by the government for false billing (See quotation of the statute defining this offense on Respondent's brief, page 15). The legal rate obviously is that applicable to a $1,000 shipment.

Only in case a valuation is *bona fide* on the part of both shipper and carrier can it control the rate. If the shipper falsely declares the value he may be estopped to recover in case of loss more than he declares. But if the carrier becomes advised as to the true value it is the carrier's right and duty to charge the rate applicable.

So we must assume in this case that on the arrival of this shipment in San Francisco the defendant, knowing its duty, would have charged

the rate applicable to a shipment worth over $15,-000. It does not lie in the mouth of the carrier to say in order to escape liability in this suit that it would have violated its tariffs.

POINT IV.

This Court may take judicial notice of the actual tariffs and classifications.

It is not necessary to resort to presumptions to know what the tariffs and classifications contained. They were identified at the trial and although not offered in evidence, this Court may take judicial notice of them as public documents on file in a government office.

> *New York Indians vs. U. S.*, 170 U. S., 1, (614).
> *Underhill vs. Hernandez*, 168 U. S., 250 253.
> *The Habana*, 175 U. S., 677, 696.
> *Caha vs. U. S.*, 152 U. S., 211.
> *Jenkins vs. Collard*, 145 U. S., 546.
> *Heath vs. Wallace*, 138 U. S., 528.
> *Knight vs. United Land Assn.*, 142 U. S., 161.
> *Coffee vs. Groover*, 123 U. S., 1.

Moreover, the tariffs have almost the character of statutes, since every shipper must take notice of them.

> *Boston & Maine R. R. Co., vs. Hooker, supra.*

Gulf, Colorado, etc., Ry. vs. Hefley, 158 U. S., 98.
Texas & Pacific Ry. Co. vs. Mugg, 204 U. S., 242.
Chicago & Alton R. R. Co., vs. Kirby, 225 U. S., 153.

POINT V.

The tariffs and classifications contemplated that if value existed it should be charged for in the rate, whether expressly "declared" or not. That is to say, they are in harmony with the Carmack Amendment and the common law.

Assuming that the tariffs may be judicially noticed, we shall ask leave to submit the tariff book to the Court's attention.

The following are some of the pertinent provisions:

"6 (a) *Valuation Charges within the United States and Canada.* When the value of any merchandise shipment (C. O. D. or otherwise) exceeds $50.00, the following additional charges must be made on value (charge for value whether insured or not):

(b) When merchandise rate is $1.00 or less per 100 lbs., 5 cents for each $100 value, or fraction thereof.

(c) When merchandise rate exceeds $1.00 and not more than $3.00 per 100 lbs., 10 cents for each $100 value, or fraction thereof.

(d) When merchandise rate exceeds $3.00 and not more than $8.00 per 100 lbs., 15 cents for each $100 value, or fraction thereof.

(e) When merchandise rate exceeds $8.00 per 100 lbs., 20 cents for each $100 value, or fraction thereof.

(f) *When the Weights of Separate Packages,* from one consignor to one consignee, are aggregated under Rule 4, the value of each of such separate packages must also be aggregated, and if the gross valuation exceeds $50.00, an additional charge for value must be made.

(g) *These Charges must not be Applied to Shipments of Money* (except Silver Coin in amounts of less than $1,000 and Minor Base Coin), *Bonds* or Live Stock, being intended to apply only to packages or shipments of merchandise, jewelry, valuable papers, postage stamps, and internal revenue stamps.

(h) *The Classification Rates on Live Animals, Live Birds, or Live Stock* apply only when the declared value does not exceed the following:

Horses, Jacks or Mules..........$75.00 each

Bulls, Burros, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers, or animals not otherwise specified ....$50.00 each

Birds, Cats, Ferrets, Guinea Pigs, Hares, Mice, Opossums, Prairie Dogs, Rabbits, Squirrels, Fancy Pigeons or Fancy

Fowls, or other Live Fowls (except for market), or Reptiles............$5.00 each

When the value declared by the shipper exceeds that given above, an additional charge must be made on the excess value according to the following:

When the merchandise rate is not over $1.00 per 100 lbs. the additional charge will be 5% of the excess valuation.

When the merchandise rate is over $1.00 and not over $2.00 per 100 lbs the additional charge will be 7% of the excess valuation.

When the merchandise rate is over $2.00 and not over $3.00 per 100 lbs. the additional charge will be 10% of the excess valuation.

When the merchandise rate is over $3.00 and not over $5.00 per 100 lbs the additional charge will be 12% of the excess valuation.

When the merchandise rate is over $5.00 per 100 lbs. the additional charge will be 15% of the excess valuation.

(i) *The Charges for Valuation given above must be made on the Through Rate,* whether carried by one or more companies, and in the latter case are to be divided between the Companies carrying on the same basis as the through rate for transportation is divided."

"9 (a) *Give a Receipt of the Prescribed Form* for all matter received. *Always ask shippers to declare the value,* and when given insert it in the

receipt, mark it on the package and enter amount on the way-bill. If shippers refuse to state value, write or stamp on the receipt '*value asked and not given.*' Packages offered for shipment by *Bankers or Brokers,* and packages marked *For the U. S. Mints* must be *refused* unless value is declared.

(b) *When any Matter is Received at Owner's Risk,* write or stamp on face of receipt '*at owner's risk.*'

(c) *When a Package is Marked C. O. D. for a much larger amount than the Declared Valuation,* it is the duty of the person receiving such a shipment, before issuing a receipt therefor, to satisfy himself that the actual value is correctly stated. If the shipper refuses to specify the character of contents, charge should be made on full amount of C. O. D."

It will be found that the rates given under "money index and classification" at pages 36 *et seq.* of the tariff, applying to acceptances, accounts, bills, bonds, bullion, coin, coupons, currency, deeds, etc., are usually based exclusively on value and not on weight.

The fact that the agent is required to charge for value *whether insured or not* has pertinency upon the point covered by Point IV. of petitioner's principal brief.

The eagerness of the carrier to obtain the rate for value where it exists is well shown by the provisions that packages shipped by bankers and brokers are to be absolutely refused unless the

value is declared, and that the agent is to require the shipper of a C. O. D. package to show cause why he should not be charged on the full amount to be collected on delivery. In the case of C. O. D. shipments the shipper is to be required to "specify the character of contents," evidently so as to enable the carrier to determine the value for itself and assess a charge accordingly.

There is no warrant in the tariffs for an agreed undervaluation. Indeed, such a practice violates the requirement of rule 6 that "when the value of any merchandise shipment (C. O. D. or otherwise) exceeds $50.00, the following additional charge, *must* be made on value."

POINT VI.

It being established that the tariffs must be presumed to have required, and did require, the carrier to charge for the actual apparent value of the shipment, the carrier, in the absence of an estoppel, is bound to respond in damages equal to the actual value.

None of the elements of an estoppel are presented. The carrier was in no wise deceived or misled as to the character and value of the shipment.

Any agreement as to the amount of the rate in conflict with the tariffs was of course void and of no effect. The carrier was bound to charge its legal rates, and it must be assumed that it would have done so.

Kansas City So. Ry. Co. vs. Carl, 227 U. S., 639, 650.
Missouri K. & T. Ry. Co. vs. Harriman, 227 U. S., 657, 671.

POINT VII.

If it be assumed that the tariffs and classifications purported to authorize such an undervaluation contract as was made: (a) they would be not only unreasonable but unlawful, as in conflict with the Carmack amendment and the common law; (b) such contracts and tariffs have been condemned by the Interstate Commerce Commission. For these two reasons recourse to the Commission for revision of the tariffs and classifications was unnecessary.

It is of course now well settled that the reasonableness of filed tariffs and classifications cannot be inquired into by the courts. That recourse must be had to the commission for their revision.

If we are right, however, in our contention that a tariff authorizing the practice of undervaluation would be void under the Carmack amendment, then under that statute such a "rule or regulation" would not exempt the carrier from the liability imposed.

The exclusive powers of the commission have reference to what is primarily a question of fact, the question of reasonableness of rates and classifications.

Illinois Central R. Co., vs. Commission, 206 U. S., 441.

Whether $100 is a fair average valuation for a horse, or $5 per hundredweight for household goods, or $100 for personal baggage, is of course a question of the reasonableness of carrier's classifications, of which the commission has exclusive jurisdiction (see *Carl* and *Hooker* cases *ut supra*).

In essence the doctrine is that the reasonableness of rates is an administrative question, over which the commission has exclusive jurisdiction.

> *U. S. vs. Pacific, etc., Co.,* 228 U. S., 87, 100.
>
> *Texas & Pac. Ry Co. vs. Abilene Cotton Oil Co.,* 204 U. S., 426.
>
> *Baltimore & O. R. Co. vs. U. S.,* 215 U. S., 482.
>
> *Proctor & Gamble Co. vs. U. S.,* 225 U. S., 282.

We insist that the doctrine has no application to a tariff provision which is void as a matter of law, as being in direct conflict with a statute. The language of the Carmack amendment is that "no rule or regulation" shall exempt the carrier from the liability thereby imposed. Such questions of law are judicial in character, not administrative.

Furthermore, prior to the trial of this action the Interstate Commerce Commission had "administratively" declared the practice of carriers securing exemptions by undervaluations, whether such practice was manifested by tariffs or by unwritten custom, to be illegal.

In the *Matter of Released Rates*, 13 I. C. C. Rep., 550, 556, 561.

This shipment took place May 3, 1907. The ruling of the commission was made May 14, 1908. This case was tried June 1, 1910. At the trial one of the plaintiff's principal reliances was this ruling of the commission.

It is immaterial that the parties to this litigation may not have been direct parties to this ruling. If it was administrative in character, it involved no determination of an issue of fact. Therefore, it had an even wider validity than rulings of the Commission such as that discussed in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 426, 446, where this court said:

> "When the commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked, not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all."

It seems clear that when the commission has "administratively" ruled that a tariff or other practice of undervaluation was illegal and void from the beginning, it should have an effect similar to an adjudication *in rem;* that it should not be necessary to go to the commission again and again in order to obtain a ruling of law.

The ruling of the commission has been before each court throughout this litigation. Moreover, federal courts take judicial notice of the rulings of government departments. This case originated in a federal court, unlike *Robinson vs. B. & O. R. R. Co.*, 222 U. S., 506.

See cases cited under Point IV. above.

POINT VIII.

If it be assumed that the undervaluation contract was illegal, as an attempt to procure a rate made unlawful by the tariffs or by the Carmack amendment and common law, or by all three, such illegality would not bar a recovery.

We now come to what is perhaps the most important question presented on this record. It was clearly passed on by this court in

> *Merchants' Cotton Press & Storage Co. vs. Insurance Co. of N. A.*, 151 U. S., 368,

but so far as we know has never been decided since. The briefs of counsel discussed it in

> *Missouri, K & T. R. Co. vs. Harriman*, 227 U. S., 657, at page 662,

but this court went no further than to say, apparently assuming that if the contract was illegal that would not bar a recovery (227 U. S., at page 671):

> "When the carrier graduates its rates by value, and has filed its tariffs showing two

rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the 1st section of the Elkins Act of February 19th, 1903. (32 Stat. at L. 847, Chapter 708)."

Citing:

Texas & P. R. Co. vs. Mugg, 202 U. S., 242.

Chicago & A. R. Co. vs. Kirby, 225 U. S. 155.

"The particular cattle were loaded by the shipper and were never seen by the company's agent. Neither was it claimed that he was informed of the value or quality of the cattle to be shipped. We see no ground upon which this contract can be held upon its face to have offended against the statute."

On the former argument counsel for defendant raised the point (Respondent's brief, Point V, pages 14 *et seq.*). We now answer it thus:

(a) No offense against the act was here consummated. The plaintiff did not declare any value. Value was "asked and not declared" by

the terms of the bill of lading itself. No express agreement as to the rate was made. The implied false declaration that the value did not exceed \$50.00 which might ordinarily be inferred from the acceptance of a bill of lading stating that in the absence of a declaration of the value it should be taken not to exceed \$50.00, (*Wells Fargo & Co. vs. Neiman-Marcus Co.*, 227 U. S., 469, at page 476), would not exist here for the reason that there was no intent to deceive. Both shipper and carrier knew that the value immensely exceeded \$50.00. Further, it must be assumed that the carrier would have charged the correct rate. It would have been in a position to do so at destination, and not even an attempted agreement to the contrary stood in the way. There was at the very most a *mere intent* to violate the act which was not consummated.

> "Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case showing, not by way of inference, but clearly and directly, such violations. No violation of statute is to be presumed."
>
> *Parsons vs. Chicago & N. W. R. Co.*, 167 U. S., 447, 455.

(b) If such an illegal agreement was made the plaintiff could recover either on the causes of action set forth in the complaint not founded on the contract or on the contract itself, stripped of

its illegality. The first cause of action is plainly founded on the agreement implied at common law to carry safely and deliver —on the carrier's common law liability as an insurer. This cause of action makes no mention of the actual (void) contract of carriage (Transcript, pages 2-3). Recovery could also be had on the second alleged cause of action, founded on negligence (Transcript, page 3). The third cause of action mentioned the bill of lading but was founded on the right of action given by the Carmack amendment, which provides that the existence of an exemption clause in the very bill of lading that it requires the carrier to issue shall not exempt the carrier from the liability thereby imposed.

This proposition was expressly recognized in:

> *Chicago & Alton R. R. Co. vs. Kirby,* 225 U. S., 155.

The plaintiff there based his action solely on an agreement for special expedition of the shipment, not contemplated by the tariffs. This the Court held to be illegal, and it undoubtedly was a concession from the established tariffs forbidden by the 1st section of the Elkins Act, so that in agreeing upon it both carrier and shipper committed technical misdemeanors. But this Court said (225 U. S., page 166):

> "The claim that the defendant in error may recover upon the carrier contract, stripped of the illegality, under *Merchants'*

Cotton Press & Storage Co. vs. Insurance Co. of N. A., 151 U. S., 368, is not presented by this record. The declaration counted only upon the breach of a special contract which was illegal. There was no count based upon the carrier's liability for negligence in not promptly shipping and delivering. The judgment was rested upon the damages resulting from the breach of the special contract, and not at all upon the liability of the carrier otherwise."

The *Merchants' Cotton Press & Storage Company* case referred to is precisely in point. There was an agreement for a rebate which was unlawful by the terms of the act to regulate commerce as it then read. The Supreme Court of Tennessee, from which the case came to this Court, said (91 Tenn., 537):

> "We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and conveyed by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void; and we think there is nothing in the law, or the policy of it, which requires a construction that would excuse a carrier

> from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and of course agreed freight rates in violation of law could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence. No different construction has yet been put upon the interstate commerce law, so far as we are advised, and we decline to give it any other."

This Court said "we concur in the correctness of this conclusion of the State Supreme Court." As an entirely independent ground of decision this Court stated that it was "difficult to understand" how the allowance of a rebate to the agents for the owners or consignees of the cotton would vitiate the bills of lading which were issued to the owners,—that the owners were not parties to the rebating agreement.

This case was decided in the Tennessee Court while Mr. Justice Lurton was a sitting justice of the court. It was decided in this Court unanimously. The cause of action arose in 1887, and the case involved a loss of about $700,000. (See a companion case, *Deming vs. Merchants Cotton Press & Storage Co.*, 90 Tenn., 311).

In attempting to escape the effect of this decision the defendant's counsel urged on the former argument (respondent's brief, pages 18-19) that at the time the action arose rebates were unlawful on the part of the carrier only; that the plaintiff had elected to proceed on the contract exclusively; and that the better reason was to be found in the opinion of the Supreme Court of Illinois in *Ellison vs. Adams Express Co.*, 245 Ill., 410, which he contends is in his favor.

The first contention is unfounded. The original act (24 Stat, at Large, 379; 1 Supp. to Rev. Stat. U. S., 529) provided (section 6):

> "And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

An entirely separate section, §10, made the violation of any of the provisions of the act by a carrier a misdemeanor, whether done, "alone, or with any other corporation, company, person or party."

The fact that no criminal penalty for making an illegal rebating agreement was visited on a

shipper until the amendments of March 2d, 1889, were passed (25 Stat. at Large, 855, 1 Supp. to Rev. Stat. U. S., 684) did not render the agreement any the less illegal as to the shipper than as to the carrier: for such a transaction is more than *malum prohibitum*, it is against public policy, as declared, if not at common law (*Parsons vs. Chicago & N. W. R. R. Co.*, 167 U. S., 447, 455) at least by the statute.

Nor is the contention that the plaintiff elected to stand on the contract of any force. We believe that under the authority of the *Merchants' Cotton Press & Storage Co.* case, it could do so, the contract being stripped of its illegality, and deemed perforce of the statute made in accordance with the tariffs instead of in violation of them. But the plaintiff did not do so. The plaintiff offered the bill of lading in evidence under a stipulation of both parties which was read in evidence and is printed on pages 12 to 14 of the Transcript. The express receipt was a part of this stipulation, being marked "Exhibit A" and attached to the stipulation. The stipulation, after referring to the bill of lading or shipping receipt "which is hereto annexed and marked (Exhibit 'A,' and which said shipping receipt plaintiff will offer in evidence," continues:

> "Plaintiff, however, in offering the said receipt in evidence reserves the right to contend and offer evidence to show that at the time of said transaction no request was made, or refused, to declare a value, *and plaintiff*

also reserves the right to contend that some part or parts of said receipt are void, as prohibited by the interstate commerce law and by common law."

An offer of the bill of lading under these stipulated reservations could not possibly debar the plaintiff from urging what it now urges. This was simply an offer of the bill of lading, properly perhaps a matter of defense, out of order for convenience.

The final contention of the defendant, that the ruling of the Supreme Court of Illinois in *Ellison vs. Adams Express Co.*, 245 Ill., 410, is the better reason, leads to a discussion of the ultimate principles involved.

The *Ellison* case is distinguishable on the ground that there the shipper actually deceived the carrier. He willfully refused to give the value of the packages and the carrier had no means of ascertaining their value. Furthermore the failure to disclose was directly connected with the loss. Had the extra value of the packages been known they would have been carried on a different car and not lost. The case seems to decide that liability should be limited to \$50.00, named in the receipt. If correctly decided, on theory it should go further and hold that the plaintiff could not recover anything. Under the decisions of this Court since made, the actual decision of the case that liability should be limited to \$50.00 was doubtless correct. But we

dispute the correctness of the reasoning on which it was based.

(1) It is a well recognized exception to the rule "*ex dolo malo non oritus actio*" that where the plaintiff does not need the aid of an illegal contract incidentally connected with a transaction, he may recover. But there must be an independent ground of recovery in tort or contract.

> 9 *Cyc.*, 556;
> *McMullen vs. Hoffman*, 174 U. S., 639, 654, 655, and cases cited.
> *National Bank & Loan Co. vs. Petrie*, 189 U. S., 423.
> *Gray vs. Hook*, 4 N. Y., 449.
> *Woodworth vs. Bennett*, 43 N. Y., 273.
> *Hoyt vs. Cross*, 108 N. Y., 76.
> *Dennehy vs. McNulta*, 86 Fed., 825.
> *National Distg. Co. vs. Cream City Mfg. Co.*, 86 Wisc., 352.
> *Minn. Lumber Co. vs. Whitebraest Coal Co.*, 56 Ill. App., 248.
> *Washington Irr. Co. vs. Kurtz*, 119 Fed 279.

In *Woodworth vs. Bennett, supra*, the Court say, citing with approval *Gray vs. Hook, supra:*

> "It has been laid down as a test that whether a demand connected with an illegal transaction is capable of being enforced at law depends upon whether the party requires

> any aid from the illegal transaction to establish his case."

The opinion of Mr. Justice Peckham in *McMullen vs. Hoffman, supra,* contains without doubt the most learned and exhaustive discussion of the matter to be found in the reports.

It was unnecessary for the plaintiff to prove the contract, or the smallest part of it, to recover in this case as for negligence.

Proof of the contract was not irrelevant—it was part of the *res gestae*—but it was unnecessary. It was not even necessary to prove the destination of the property. By showing delivery to the carrier and that while it was in the carrier's possession, it was damaged through the carrier's negligence, a cause of action was made out. For one who comes into the possession of property of another without contract and damages it through negligence, is liable to the owner; as in the case of a gratuitous bailee, or the finder of lost property.

> *Murgoot vs. Cogswell,* 1 E. D. Smith, N. Y.), 359.
> *Dougherty vs. Posegate,* 3 Iowa, 88.
> *Doorman vs. Jenkins,* 2 Ad. & E., 256.

In the case of

> *National Bank & Loan Co. vs. Petrie,* 189 U. S., 423,

the plaintiff sought to rescind a contract on the ground of fraud. The parties were attempting by the contract to accomplish an illegal object. Money was paid under the contract which the action was brought to recover. This Court said (by Mr. Justice Holmes):

> "The declaration goes upon a rescission of the contract. * * * If the withdrawal were on the ground of repentance alone the law might, or might not, leave the parties where it found them. * * * But a person does not become an outlaw and lose all rights by doing an illegal act."

Citing:

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.

> "The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that, as between the parties, the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object,

because he has brought about the other's consent by wrong. * * * It must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest. Cases where the action is on the illegal contract do not apply. * * * Here the attempt is to recover outside of it, treating it as set aside. * * * When a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract, and that party must take it as it is made."

The defendant cannot at once claim that the contract was illegal and void, and use it as an affirmative defense to the plaintiff's action in tort for negligence, not based on the contract.

The same principle has been laid down by this court in

Kinsman vs. Parkhurst, 18 How., 289.
Pullman's Palace Car Co. vs. Central Transp. Co., 139 U. S., 162; 171 U. S., 138.
Armstrong vs. American Exch. Nat. Bank, 133 U. S., 433.

Each of these cases holds in effect that when the plaintiff, by his suit, disaffirms rather than bases his right upon the illegal contract, he may require the defendant to account for property which comes into his hands through the contract.

In the *Kinsman* case Mr. Justice Curtis said:

> "Even when money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid him." Citing *Sharp vs. Taylor*, 2 Phil. Ch., 801; *Tenant vs. Elliot*, 1 B. & P. 3.

In the *Pullman's Palace Car Co.* case, Mr. Justice Gray said (page 60 of 139 U. S.):

> "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return or, failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

On the second appeal the court (Mr. Justice Peckham) reviewed the matter and reached the same conclusion. Distinctions were carefully drawn between property created by the illegal con-

tract, which were the fruits thereof, and property already in existence which passed under the contract merely as a means to the performance of it. In the course of the opinion he quotes from Lord Mansfield's decision in *Holman vs. Johnson,* 1 Cowp., 341, which is relied upon by the Supreme Court of Illinois in the *Ellison case.* It is interesting to note the whole passage reads as follows:

> "The objection that a contract is immoral or illegal, as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

(2) But the right to recover can be put on a still stronger ground. Contracts exempting carriers from negligence liability have always been regarded as against public policy. Yet the shipper, however freely he made the contract, has been allowed to recover. This has been because the policy is *publici juris.* The public have an interest in seeing that those who occupy public employments should not put off the full measure of duty

which they owe to the public. The courts have been careful to say that this principle depends upon the public character of the carrier's employment. When the carrier engages in other activities than as common carrier the principle does not apply.

Santa Fe, P. & P. R. Co. vs. Grant Bros. Const. Co., 228 U. S., 177, 194.

In allowing shippers to recover, the Courts have done so, not on account of any special consideration for the shipper, who may have made the contract with his eyes open, but because the *public* policy is involved. On these grounds the shipper may recover, not only in spite of the provisions of the contract, but, what is more, in spite of the fact that he has made a contract which public policy forbids as *contra bonos mores.*

The making of a contract which is against public policy would ordinarily prevent either party from taking any advantage of it. But if we are to assume that the bill of lading is the necessary basis of any recovery for damages to the property shipped under it, then every case in which it has ever been held that the shipper may recover in spite of an exemption contract is an authority in our favor. Yet we are unable to find any case in which the contention was even made that the shipper could not recover because he had made an illegal contract.

The Interstate Commerce Act should not be so construed as to enable a carrier to procure the exemption from liability for negligence which the

act itself forbids by setting up its own wrong. Here is a higher public policy than that which in an ordinary case prohibits anyone from taking advantage of an illegal transaction.

This higher public policy has been recognized by the Carmack Amendment, providing that no contract, receipt, rule or regulation shall exempt the carrier from the liability imposed. The defendant would have you read into the statute this addition: "Unless such contract be founded upon the consideration of a concession from the established rate." This the courts cannot do. The will of Congress plainly is that while the shipper in such a case may be subjected to a criminal penalty, he shall not suffer in addition the attainder of his goods.

Respectfully submitted,

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PRESS OF "THE BUFFALO COMMERCIAL."

13

(22,878)

SUPREME COURT OF THE UNITED STATES.

October Term, [redacted]. 1914

No. [redacted]. 14

THE GEORGE N. PIERCE COMPANY,
Petitioner,

vs.

WELLS FARGO & COMPANY.

Brief for Petitioner on Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

ALFRED L. BECKER,
WILLIAM B. HOYT,
JOHN W. YERKES,
Of Counsel.

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LIST OF CASES.

(Indexed to names of both parties.)

(22,878)

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 104.

THE GEORGE N. PIERCE COMPANY,

Petitioner,

AGAINST

WELLS FARGO & COMPANY.

Brief for Petitioner on Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

This case comes to this Court on writ of certiorari (page 66), granted to review the judgment of the Circuit Court of Appeals for the second circuit (page 65), affirming by a divided court, on writ of error sued out by the plaintiff below, a judgment of the Circuit Court of the United States for the Western District of New York (page 11).

Said judgment of the Circuit Court was in favor

of the plaintiff, except as to the amount, and against the defendant, for fifty dollars damages and eighty-five dollars and fifty-five cents interest and costs upon the direction of a verdict by the Court (Holt, United States District Judge).

The opinion of the Circuit Court of Appeals was written by Judge Ward (page 58). A dissenting opinion was written by Judge Noyes (page 62).

Jurisdiction rests on diversity of citizenship.

The complaint (page 2) was originally against both the defendant in error and the Atchison, Topeka & Santa Fe Railway Company, but the service of the summons on the defendant Railway Company was set aside by order of the court (page 9), and it was not possible to find the Railway Company within the District.

The complaint (page 2) alleges that the defendant Express Company undertook, as a common carrier, to transport plaintiff's shipment of four automobiles and additional parts from Buffalo, New York, to San Francisco, California, on May 3, 1907, and that the shipment was never delivered at destination.

The breach of duty by the defendant is pleaded in four ways (pages 2-4):

(1) As a breach of the contract to carry safely;

(2) As a failure to deliver according to contract;

(3) As negligence; and

(4) As a breach of the duty imposed on the initial carrier by Section 20 of the Interstate

Commerce Act, the Carmack Amendment so-called (Act of June 29, 1906, Chap. 3591, Section 7; 34 Stat., at L., 593; U. S. Comp. Stats., Supp., 1911, page 1307).

It will be observed that under the first cause of action, contained in paragraph II of the complaint, it is alleged that there was a failure to deliver property to the consignee thereof, as well as a failure to carry safely (page 3).

The complaint alleges that the value of the shipmen was $20,000 (page 4).

The answer puts in issue all the material allegations of the complaint and alleges several affirmative defenses, based on the bill of lading (pages 5-8).

The issues on the trial were reduced by stipulation and by failure of the defendant to dispute the plaintiff's evidence, to two in number:

First.—Whether the limitation of liability contained in the bill of lading to fifty dollars, payable according to its terms only in case the plaintiff should prove gross negligence or fraud, was valid.

Second.—Whether by its conduct the plaintiff was estopped from holding the defendant for a sum in excess of fifty dollars.

The alleged estoppel was predicated upon an inadvertent statement by the plaintiff's agent, to the effect that the shipment was insured by the plaintiff—a statement which was not in accordance with the facts.

ance, but only up to the time the shipment left, after which there was no insurance (page 24).

The bill of lading contained no provision that the carrier should be entitled to the benefit of any insurance carried by the shipper (pages 13-14).

The evidence shows that no express agreement was ever made as to the rate to be paid for the carriage of the shipment, and the rate was to be paid by the consignee (pages 15, 16, 17, 21). The defendant was at liberty to charge its lawful rate, whatever that might be; and if the lawful rate included a charge for valuation, the defendant was entitled to appraise the shipment and make such proper charge.

After the shipment had proceeded in the express car as far as a place in western Missouri, known as Norborne, the passenger train in which it was being drawn jumped the track and was wrecked. The car then caught fire and great damage was done to the shipment, although the frames of the automobiles, being largely composed of metal, were not destroyed (pages 27, 28, 31, 34, 38).

Notwithstanding the shipment was not totally destroyed, and the metal frames remained, though very seriously damaged, the defendant made no delivery of even the damaged remains, and offered no explanation whatever why the salvage from the wreck was not so delivered (page 41).

It is a matter of common knowledge that the metal forming the engines and chassis of automobiles is alone of considerable value.

The proof tended to show that the loss of the goods was due in part to an intentional conversion

of the salvage or breach of the contract to deliver, and in part to gross negligence of the defendant's agent, the Railway Company. There was evidence from which the jury would be bound to find that notwithstanding the track was badly ballasted, undermined by very heavy rains, and had a sag in it of from one to three inches, and a "slow order" was out, this passenger train was run over such track at the rate of from fifty to sixty miles an hour (pages 25-45).

SPECIFICATION OF ERRORS.

The plaintiff in error relies upon the assignments of error raising the following questions of law:

First.—That the trial court erred in directing a verdict for only fifty dollars, because said amount was insufficient (Assignment XIII, page 53).

Second.—That the trial court erred in denying the motion of plaintiff in error to go to the jury on the question of the reasonableness of the limitations of liability contained in the bill of lading (Assignments VII, page 52, XI, page 53).

Third.—That the proof having disclosed a conversion of the salvage, and breach of defendant's contract to deliver the same, the plaintiff in error was entitled to go to the jury on this question, inasmuch as the bill of lading contains, and could validly contain, no limitation of liability for conversion or failure to deliver according to the terms

of the contract, but only for loss, damage or destruction (Assignments VII and IX, fols. 92-93).

POINT I.

The limitation of liability to fifty dollars is void as against public policy and as a (partial) exemption from liability prohibited by the act to regulate commerce, Section 20 (*Kansas City Southern Railway Company vs. Carl*, 227 U. S., 639, at page 650.)

The so-called "valuation" of the articles shipped at fifty dollars for the lot is "subject to impeachment as upon its face arbitrary and unreasonable" (*Missouri, Kansas & Texas Railway Company vs. Harriman*, 227 U. S., 657, at page 669). Such a "valuation" is "arbitrary, and has no reasonable relation to the actual value" (*Kansas City Southern Railway Company vs. Carl*, 227 U. S., 639, at page 656). The actual intent of the parties, apparent on the face of the contract, was, not to liquidate the damages, but to exempt from liability.

This method of limiting liability has been regarded by the Interstate Commerce Commission as both "arbitrary" and "unreasonable" (*Id.; In the matter of Released Rates*, 13 I. C. C. Rep., 550, at page 556).

Fictitious and pretended "valuations" cannot be made a cover for what are actually contracts for exemptions from liability for negligence. A valuation, to be valid, must bear some reasonable relation to the usual and ordinary value of things of the species shipped.

The actual value of the four automobiles and parts shipped was over \$15,000, three hundred

times the so-called valuation; and the defendant stipulated the fact that it knew at the time of the shipment that the actual value was "largely in excess of one thousand dollars" (page 13), or largely in excess of twenty times the so-called valuation. The exact amount of the freight charged does not appear in evidence, but on a carload shipment from Buffalo to California it was of course many times fifty dollars.

It is not necessary, however, to resort to "evidence *aliunde* the contract" (*Kansas City Southern Railway Co. vs. Carl*, 227 U. S., 639, at page 652), or even to the stipulation that the carrier knew that the value was largely in excess of one thousand dollars, in order to demonstrate that the so-called valuation was in fact an arbitrary limitation of liability to a sum only a fractional part of the actual value, and therefore an exemption from liability for negligence. For it appeared on the face of the contract that the shipment consisted of four automobiles and a quantity of automobile accessories. The list of articles was in writing, the "agreed valuation" in print, and on the familiar principle, in determining the actual intent of the parties the written matter has controlling importance (*Thomas vs. Taggart*, 209 U. S., 335).

Argument is unnecessary that fifty dollars bears no relation of equality or approximate equality to the value of four automobiles of any make whatever, even the very cheapest known. It bears no just relation to the value of these particular automobiles; and it bears no just relation to the value

of automobiles in general, considered as a species of articles of property in transportation.

In this respect the case at bar differs from all the cases which have come before this Court; and on the other hand falls exactly within the rule of law laid down by the Interstate Commerce Commission under its fourth classification ("d") of limitations of liability as to value (*In the Matter of Released Rates,* 13 I. C. C. Rep., 550, at page 556).

Commissioner (now Secretary of the Interior) Lane's opinion under the above title, after fully stating the rules permitting agreed valuations strictly in harmony with the six or more decisions of this court since handed down, reads as follows:

> "(d) If the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount, liability for the full value cannot be escaped in the event of loss due to negligence." * * *
>
> "We are aware that the distinctions which are here drawn have not been invariably recognized, but it is believed that this has been due to a misconception of the real scope of the decision in *Hart vs. Pennsylvania R. R.* *Careful study of the opinion of the Court and of the cases which are cited in support of the decision must lead inevitably to the conclusion that the principle does not extend beyond the case where the 'agreed valuation' is *bona fide.* It cannot apply where the valuation is purely fictitious. To hold otherwise would mean a

* 112 U. S., 331.

departure from principles which the Supreme Court has maintained with unvarying consistency. In the *Hart* case the Supreme Court says:

> 'If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity. * * * He is estopped from saying that the value is greater.'

"But if the carrier and shipper both know that the value agreed upon is out of all proportion to the true value, it cannot be said that the shipper has been guilty of fraud or misrepresentation—he is not estopped from proving the real value of his goods."

In the case at bar the "agreed valuation" was three-tenths of one per cent. of the actual, obvious value of the shipment. It was only a small fraction of the value, which anyone must infer from the list of articles in the bill of lading itself.

If articles worth $15,000 may be valued lawfully at $50, articles worth $50 may be valued at 16 cents. A million dollars in specie may be valued at three thousand dollars. As suggested in the dissenting opinion below, better have no public policy at all against exemptions from liability for negligence, than permit it to be so easily evaded! (page 65). And ss suggested in Commissioner Lane's opinion, to permit a practical exemption to be obtained by the fiction of a valuation, would mean a departure from principles which this court "has maintained with unvarying consistency."

It would point out to carriers a method of evading the law against exemptions by the use of a hollow legal fiction.

Neither the common law nor the statute against exemptions from liability for negligence has any practical force whatever if it can be evaded by naming as a valuation a sum which, by comparison with either the actual value of the things shipped, or the usual and ordinary value of things of the same species, is merely what the law terms "a nominal sum."

It will not be contended by the carrier that if liability were limited to nothing unless a higher rate were paid for "valuation" the contract would be valid (*Calderon vs. Atlas S. S. Co.,* 170 U. S., 272, at page 282, where this precise point was decided). Neither will it be contended, we think, that if the liability were fixed at 16 cents on goods obviously worth $50, the limitation would hold. But 16 cents bears the same relation to $50 that $50 bears to $15,000.

Public policy and the statute cannot be satisfied by a nominal "valuation." Such is no valuation at all. To call $50 a valuation in this case does not make it such. It is too plain that the *actual intention* of the contract was not to value the shipment, but to exempt from liability for negligence. Where public policy or statutory prohibition is involved, the law looks beyond the form to the substance.

The cases deciding whether a penalty or liquidated damages were meant by a clause in a written contract relating to damages for its nonfulfillment, are in point and furnish a rule of decision.

> *United States vs. Bethlehem Steel Co.,* 205 U. S., 105.

Sun Printing & Publishing Assn. vs. Moore, 183 U. S., 642.
Bignall vs. Gould, 119 U. S., 495.
Little vs. Banks, 85 N. Y., 258.
Ward vs. Hudson River Building Co., 125 N. Y., 230.

These cases establish the following principles:

(1) A contract for a penalty in gross is unenforceable in equity; or, under the Statute, 8 and 9 Wm. III, Chap. 11, at law. (In close analogy to a carrier's contract for an exemption from liability for negligence; though the latter rule is one of public policy and has now been made the statute law of the land.)

(2) Where the parties intend in good faith to liquidate their damages, their agreement will be upheld by the courts. Where they intend to agree upon a penalty the agreement is unenforceable.

(3) In determining the intent of the parties, the language they use in characterizing the agreement as one for liquidated damages or for a penalty is not necessarily controlling. (*United States vs. Bethlehem Steel Co.,* 205 U. S., at page 120.)

(4) In construing the contract, where doubt exists as to its meaning, recourse may be had to the facts surrounding the agreement and to the prior negotiations, for the purpose of determining the correct construction of the language of the contract. (205 U. S., at page 118.)

(5) Where there is an extraordinary disproportion between the agreed damages and the prob-

able loss resulting from a breach—at least where such disproportion is apparent on the face of the contract—a stipulation as to damages will be deemed to contemplate a penalty.

The last proposition was the subject of much discussion by Mr. Justice (now Chief Justice) White in the *Sun Printing & Publishing Company* case. He finally summed up the matter in this language. (183 U. S., at pages 672-673):

> "It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract*, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages, or to stipulate the payment of an arbitrary sum as a penalty, by way of security."

The same principle was recognized by Mr. Justice Peckham in the *Bethlehem Steel Company* case (205 U. S., at page 121), where the learned Justice was careful to point out that the amount stipulated as damages was "not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages as to show that the parties must have intended a penalty, and could not have meant liquidated damages."

In every one of the above cases the rule was laid down that the intention of the parties must govern in determining whether the contract contemplated a penalty or liquidated damages; that such intention is to be determined from the reading of the entire contract and from the consideration of the surrounding circumstances; that "this intention cannot be entirely determined by the use of the word 'penalty' or of the words 'liquidated damages.' " (*Little vs. Banks,* 85 N. Y., at page 266, cited with approval by Mr. Justice Peckham in *United States vs. Bethlehem Steel Company,* 205 U. S., at page 120.)

The application of these cases to the case at bar is plain. A similar policy to that which refuses to enforce agreements for penalties refuses to enforce agreements for the exemption of carriers from liability for negligence. The two policies alike look to the essence of the contract to ascertain the intent of the parties, rather than to the form of words which the parties may employ. When the real intent of the parties, however expressed, is merely to *pretend* to liquidate damages naming a sum so disproportionate to any actual loss within contemplation as to indicate in the one case an intention to agree upon a penalty or forfeiture, or in the other case an intention to agree upon an exemption from liability for negligence, the agreement will not be enforced.

Analysis of the Authorities on which Defendant Relies.

1. *Hart vs. Pennsylvania R. R. Co.*, 112 U. S., 331.

Facts: Shipment of a carload of horses. Bill of lading valuing the horses at two hundred dollars each, or twelve hundred dollars for the carload. Actual value of one horse claimed to be $15,000, and of the other horses, $3,000 to $3,500 each. Recovery limited to $1,200. It does not appear from the opinion in the case whether the carrier knew at the time of the shipment that the horses were of greater value than that named in the bill of lading; the assertion that it did know was made in the brief of counsel for the shipper (112 U. S., at page 335).

Distinguishing features: (*a*) It did not appear on the face of the bill of lading that the "agreed valuation" did not equal or exceed the actual value. (*b*) The valuations named in the bill of lading were graded according to the species of the animal shipped: "horses or mules," $200; "cattle or cows," $75; "fat hogs or calves," $15; "sheep, lambs, stock hogs, or stock calves," $5. Such valuations were not disproportionate to the usual and ordinary values of things of the species named.

In the case at bar it was stated below by counsel for the Express Company that it appeared by the record in the *Hart* case that the agent of the Railroad Company had been informed of the actual value of the horses. If true, this does not affect

the distinction. We do not contend that carriers must appraise every shipment. What we do contend is that the agreed valuation must bear some reasonable relation to the ordinary and usual value of things of the species shipped. Otherwise it is merely a contract for an exemption from liability for negligence, which is void, no matter whether liability for negligence can be purchased at a higher rate or not (*Kansas City So. Ry. Co. vs. Carl,* 227 U. S., 639, at page 650; *Calderon vs. Atlas S. S. Co.,* 170 U. S., 272, 282).

The law of the *Hart* case: "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, *is fairly made,* agreeing on the valuation of the property carried," etc.

Distinguishing principle: A contract fixing a "valuation" that on its face *could not be contended to be the actual value of things of the species of those shipped* is not a valuation at all; it is a pseudo valuation, a pretense merely, to cover an exemption contract, such as is rendered void by the Carmack Amendment of Sec. 20 of the act to regulate commerce, as well as by the common law. *Such a contract is not "fairly made."*

2. *Adams Express Co. vs. Croninger,* 226 U. S., 491.

Facts: Shipment of a sealed package containing a ring. Actual value of ring, $125. Bill of lading value, $50. Carrier did not know the actual value. Bill of lading and tariffs both provided that the "company's charge is based upon the value of the property, which must be declared by the shipper."

Distinguishing features: (*a*) It did not appear on the face of the bill of lading that the "agreed value" did not equal or exceed the actual value. (*b*) So far as the carrier knew, the actual value was no greater than the agreed value, so that an estoppel existed. (*c*) The agreed maximum value bore a reasonable relation to the usual and ordinary value of things of the species named, viz.: small sealed packages *of unknown contents* sent by express.

The law of the *Croninger* case (226 U. S., at page 509): "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. * * * But the rigor of this liability might be modified through any *fair, reasonable* and *just* agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. * * * It has, therefore, become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a *fair, open, just* and **reasonable** agreement, limit the amount recoverable by a shipper, in case of loss or damage, to an agreed value made for the purpose of obtaining the lower of two or more rates of charges, proportioned to the amount of the risk." (Italics not in original.)

Distinguishing principle: An agreed valuation which does not bear a reasonable relation to either the actual value of the thing shipped or the ordinary value of things of the species is not fair, reasonable or just. It is unlawful, as a mere evasion of the prohibition of the common law, and

now of the statute, against exemptions from liability for negligence.

3. *Chicago, Burlington & Quincy Railway Co. vs. Miller*, 226 U. S., 513.

4. *Chicago, St. P., M. & O. Ry. Co. vs. Latta*, 226 U. S., 519.

Shipments of horses; closely parallel to the *Hart* case.

5. *Wells Fargo & Co. vs. Neiman-Marcus Co.*, 227 U. S., 469.

Facts: Shipment of well wrapped and tied package of furs, weighing seven pounds. Agreed value, $50; actual value, $400. Bill of lading same as in case at bar in printed portion. Facts closely similar to case at bar with respect to occurrences at time of shipment. Carrier did not know contents of package.

Distinguishing features: Substantially the same as in the *Croninger* case. The agreed maximum value bore a reasonable relation to the usual and ordinary values of things of the species named, viz.: express shipments of packages of concealed goods weighing a few pounds.

6. *Kansas City Southern Railway Co. vs. Carl*, 227 U. S., 639.

Facts: Shipment of household goods. Agreed value, $5 per hundredweight; actual value, $75 in the aggregate.

Distinguishing features: The same as in the other cases.

The law of the *Carl* case: It was substantially conceded in the opinion of the majority of the court, that the agreed valuation must bear some reasonable relation to the ordinary value of goods of the species; *i. e.,* the classification for purposes of valuation must be reasonable. The disagreement between the majority of the justices and Justices Hughes and Pitney, who dissented, apparently arose upon the question whether the agreed valuation did in fact bear such reasonable relation (page 656), or was rather an exemption from liability for the excess of damage or loss over five dollars per hundred pounds.

The bill of lading contained the following:

> "I, ..., the consignor, hereby release the said company, and all other railroad and transportation companies over whose lines the above property may pass to destination, from all liability from any loss or damage said property may sustain in excess of $5.00 per 100 lbs. * * *"

But in other parts of the bill of lading such sum was repeatedly termed a "valuation," and this court held that it was such in fact.

Mr. Justice Lurton said (page 650):

> "An agreement to release such a carrier from part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration."

In the case at bar we contend that the actual intent of a known and fictitious under valuation is to release the carrier from liability for all but the nominal sum agreed upon as the so-called valuation.

Mr. Justice Lurton continued:

> "It follows, therefore, that when the carrier has filed rate-sheets which show two rates based upon valuation upon a particular class of traffic, that it is legally bound to apply that rate which corresponds to the valuation. If the shipper desires the lower rate, he should disclose the valuation, for in the absence of knowledge the carrier has a right to assume that the higher of the rates, based upon value, applies."

In the case at bar, no rate was actually agreed upon. It will be argued that the presentation of the bill of lading containing a statement that "value was asked and not declared," and that in such a case the value did not exceed fifty dollars, was a representation as to value and a request for the "lower rate." But the answer is found in Mr. Justice Lurton's words:

> "If such a valuation be made *in good faith* for the purpose of obtaining the lower rate applicable to a shipment of the declared value, there is no exemption from carrier liability due to negligence forbidden by the statute when the shipper is limited to a recovery of the value so declared. The ground upon which such a declared or agreed value is upheld is that of **estoppel.**"

Distinguishing principle: In the case at bar the carrier knew that fifty dollars was only a small fraction of the actual value of the shipment. The carrier was not misled or deceived by the shipper. The carrier was not induced by any representation of the shipper to part with anything of value, to exercise any less degree of care, to act in any way contrary to or different from the way it would have acted had the shipper declared the value as fifteen thousand dollars. *Therefore none of the elements of an estoppel were present.*

The rate was not paid at Buffalo, and so far as we can now tell the carrier might have deemed it to be its duty to demand of the consignee at San Francisco its higher rate based upon the actual apparent value of the shipment. And even if the lower rate had been agreed upon, it would still be both the right and the duty of the carrier to exact the higher rate as filed with the Interstate Commerce Commission, based upon the value of the shipment.

Mr. Justice Lurton was careful to state that the agreed valuation must be made "in good faith." But a known under valuation is not *bona fide*, it is a fiction.

7. *Missouri, Kansas & Texas Railway Co. vs. Harriman*, 227 U. S., 657.

Facts: Shipment of cattle. Actual value, $10,-640; "stipulated valuation," thirty and twenty dollars per head. The case resembles the *Hart* case.

Distinguishing principle: Mr. Justice Lurton was careful to point out—"neither is the valuation of cattle at thirty and twenty dollars per head subject to impeachment as upon its face arbitrary and unreasonable"—thus explicitly recognizing the rule for which we contend.

Moreover, he pointed out that "the particular cattle were loaded by the shipper and were never seen by the company's agent. Neither was it claimed that he was informed of the value or quality of the cattle to be shipped."

Cases Recognizing the Principle that a Fictitious Valuation is an Exemption.

In all of the following cases the rule in the *Hart* case was not denied, but distinguished on the ground that the limitation bore no just relation to the value of goods of the species.

The New England, 110 Fed., 415.

Lowell, U. S. D. J.:

> "I believe nineteen adult first cabin passengers out of twenty who cross the Atlantic by a steamboat like the *New England* carry personal effects of a value greater than fifty dollars. Therefore the limit of fifty dollars appears to me unreasonable."

La Bourgogne, 144 Fed., 781; aff'd without passing on the point, 210 U. S., 95.

> "If the limitation * * * was $30, it was grossly inadequate. To limit liability for the loss of 2,360 pounds of baggage, for the

transportation of which the company had received \$40, to the sum of \$30, is so obviously unreasonable that further comment is unnecessary."

The Supreme Court of Georgia has held, distinguishing and doubting the *Hart* case, that the fifty dollars agreed valuation clause in the Adams Express Company bill of lading, similar to that here involved, is broadly invalid, because arbitrarily applied without any actual appraisal or valuation being made.

> *Southern Express Company vs. Hanaw*, 134 Ga., 445.

It is not necessary for us to go so far in this case. Nor has the Supreme Court of Alabama gone so far. There the rule has been laid down as follows, in an opinion citing the *Hart* case and adopting it as the law of the State:

> "Our decisions are in accord with this ruling. As to the carriage of live stock, the rule declared is, if the limit to the liability appears greatly disproportionate to the real value of the animal and the amount of freight charged, it will be pronounced unjust and unreasonable; but if it seems to have been intended to adjust the extent of liability to the reduced rate of freight charged, and to secure the carrier against exaggerated or fanciful valuations, it fixes the measure of the carrier's liability."
>
> *Western Railway Co. vs. Harwell*, 91 Ala., 340; 8 So., 649.

The Supreme Court of Wisconsin clearly recognized the distinction in

> *Ullman vs. Chicago & N. W. Ry. Co.*, 112 Wis., 150; 88 N. W., 41.

Judge Marshall said, following *Hart vs. Pennsylvania R. R. Co.* (italics not in original):

> "Enough has been said to demonstrate that we would be flying in the face of the decisions of this and most courts were we to hold that the contract in question is a mere arbitrary stipulation against liability for negligence; and at the same time we would be violating the plain words of the contract. The opening words of the bill of lading were, in substance, that the value of the horse did not exceed $100. To that reference was thereafter made in the paper as a valuation of the property, and in one instance as a valuation agreed upon between the owner and shipper. In view of that how can it be said that the limit of liability was arbitrarily fixed, no reference being had to the actual value of the property as in the *Abrams* case? *It might be so said if, while language was used ostensibly fixing the value of the property, such value was so out of harmony with the ordinary value of similar property as to indicate that value, in fact, did not enter into the transaction.* But that is not the situation here. As said by the court in *Alair vs. Railroad Co.*, apt language was used to make an agreement as to the value of

the property, and *the amount named is in harmony with common knowledge as to the value, ordinarily, of horses."*

Abrams vs. Railway Co., 87 Wis., 485; 58 N. W., 780, referred to in the *Ullman* case, was a case where there was an arbitrary limitation of liability for loss of a horse to $100, and no valuation.

In

Alair vs. Northern Pacific Ry. Co., 53 Minn., 160; 54 N. W., 1072,

also referred to in the *Ullman* case, the Minnesota Supreme Court followed the *Hart* case, but pointed out that a horse, like a sealed package whose contents are not open to inspection, may have a special value not visible to the eye, which it is the duty of the shipper to disclose; and that the agreed valuation of the horse at $100 was to be sustained because such value was that "of average ordinary animals in the country through which defendant does business."

Some years later, when a proper case came before the same court, it adopted the principle foreshadowed in the *Alair* case, and held void a valuation at $50 (through the medium of the same form of bill of lading involved in the case at bar) of property visibly worth $2,000 on which a freight rate of $330 was paid.

Murphy vs. Wells Fargo & Co., 99 Minn., 231; 108 N. W., 1070.

A number of other cases supporting the rule contended for are cited and discussed by Commissioner Lane in *Matter of Released Rates,* 13 I. C. C. Rep., 550, 556-560.

Other cases distinguishing the *Hart* case along the same lines are:

> *Union Pac. Ry. Co. vs. Stupeck,* 50 Colo., 151 (in conflict on the *facts* only with the *Carl* case).
>
> *Schwarzschild vs. National S. S. Co.,* 74 Fed., 257.

POINT II.

Properly construed the bill of lading purports to exempt the carrier from all liability for "ordinary negligence," even though a higher rate be paid. The only liability assumed under any circumstances whatever is for fraud or gross negligence. The alternative being unreasonable the limitation is void. This court has held that the alternative must be offered of full, unrestricted common law liability. (*The Kensington,* 183 U. S., 263.)

The alternative offered by the carrier in case the shipper did not agree to limitation of liability to fifty dollars, was this: In case the shipper "declared a valuation," and thereby incurred a liability to pay an additional charge, then and in such case, the carrier should be liable for loss or damage "*proved* to have been caused by or to have resulted from the *fraud or gross negligence* of said company or its servants."

This alternative is shown by the bill of lading itself, and is the only alternative proved in evidence.

The most that the shipper could secure by paying for valuation was an agreement by the carrier to be liable for gross negligence or fraud, *which must be proved.* In no event, even the payment for valuation, did the carrier agree to be liable for ordinary negligence, such as can be inferred from the non-delivery of the shipment.

> *Canfield vs. B. & O. R. R. Co.,* 93 N. Y., 538.
> *Wheeler vs. O. S. M. Co.,* 125 N. Y., 155.

That no more favorable alternative was proposed is clear from a reading of the bill of lading. It contains several independent clauses set off by semicolons, all governed by the principal or general clause at the beginning, ending with the words "but only upon the following conditions," followed by a colon "(:)." No one of these clauses can be read into any other for they are all separate dependent clauses, governed by the principal clause, but each is independent of the others.

> *Tyrrell vs. The Mayor,* 159 N. Y., 239.

Thus construed, the material portions of the bill of lading read as follows:

> "Received from George N. Pierce Co., the following articles, which Wells Fargo & Co., a corporation, hereby undertakes to forward to its agency nearest its destination, but only upon the following conditions:

> nor shall said company be liable for any loss of or damage to said property in any event or for any cause whatever, unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants;
>
> nor in any event shall said company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum the said property is hereby valued, unless a different value is hereinabove stated;"

The limitation of liability to a pretended valuation of fifty dollars was invalid because the carrier did not offer a reasonable alternative of full liability for negligence upon payment of the charge for "valuation."

This brings the case squarely within the decision of the Supreme Court in

The Kensington, 183 U. S., 263.

We quote from the statement by Mr. Justice White, with relation to the passenger ticket asserted as containing a limitation of liability:

> "One of the conditions printed on the ticket provided that there should be no liability to each passenger, 'under any circumstances,' beyond the sum of 250 francs, 'at which SUCH BAGGAGE IS HEREBY VALUED,' unless an increased value be declared and an additional sum paid, as provided by the condition."

The baggage was of a value far in excess of 250 francs.

The contract provided that the charge for valuation should subject the ship owner, if paid, only to the responsibility incurred under the ship owner's form of cargo bill of lading. As cargo the baggage would become subject to the statutory limitations of liability contained in the Harter Act, by which the carrier would be exempted from all liability for errors in navigation or management of the vessel or other negligence.

If the contention of the defendant in the case at bar were correct, it would follow that the valuation, so-called, of the baggage at 250 francs would be conclusive, and that no further inquiry would be permissible with respect to the reasonableness of other limitations.

The Supreme Court, however, looked beyond the pretended valuation, and considered the actual situation in which the passengers were placed when dealing with the ship owner. The limitation and so-called valuation were both held void because by paying for additional valuation the most the owner could obtain was: (1) subjection of the baggage to the statutory limitations of liability of the Harter Act respecting cargo, or, (2) subjection of the baggage to another limitation of liability contained in the same passenger ticket, exempting the carrier from liability for the neglect of himself or his servants.

Both points made in Mr. Justice White's opinion are pertinent here, but especially the latter. We quote from his opinion at page 275:

> "We think the conditions were unjust, and unreasonable and void because in conflict with public policy, and if the considerations which

> have led us to this conclusion be for a moment put aside, it is far from clear that other conditions contained in the ticket would not, from another point of view, lead us to the same result. In addition to the exaction with which the right to state an excess of value over 250 francs, was burdened, the ticket contains a provision to the effect that, whatever be the value of the baggage, under no circumstances will the carrier be liable for the neglect of himself or his servants. Giving effect, then, to all the provisions of the ticket, it may be doubted whether it does not result from them that not only was the baggage, when valued at 250 francs but also when valued at any increased amount, subjected to any and every risk arising from the negligence of the carrier or his servants."

If we apply the same principle to the case at bar, the attempted limitation of liability to Fifty Dollars, even though masquerading as a valuation, was unreasonable in any event, because the alternative offered was to pay for valuation and still exempt the carrier from any and all liability caused by the ordinary negligence of itself and its agents.

Nine times out of ten, all that a shipper whose goods are lost by a carrier is able to prove is that there has been no delivery. It is rare that as in the case at bar the shipper is able or has the means to follow up the transportation of the goods and obtain affirmative evidence of gross negligence. It is true that from non-delivery negligence may be presumed, but there is no authority that gross negligence may be presumed therefrom. More-

over, the bill of lading requires the shipper to show *by proof*, fraud or gross negligence. The language is, "unless said loss or damage shall BE PROVED to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants." This language would seem to exclude presumptions of negligence; there must be actual proof.

In a case where a telegraph blank limited liability to proved fraud or gross negligence, the Court of Appeals of New York said:

> "However occurring, if by no wilful misconduct, a mere mistake, or error, in the transmission of a message would not warrant a jury in finding that there had been MORE THAN ORDINARY NEGLIGENCE (see *Breese vs. U. S. Tel. Co.*, 48 N. Y., 132; *Primrose vs. W. U. Tel. Co.*, 154 U. S., 1)."
>
> *Halsted vs. Postal Telegraph Cable Co.*, 193 N. Y., 293, 300.

And see to the same effect:

> *Platt vs. R. Y. R. & C. R. R. Co.*, 108 N. Y., 258, 262.

A similar situation was passed upon by the Supreme Court in

> *Calderon vs. Atlas Steamship Co.*, 170 U. S., 272.

The bill of lading provided, "it is also mutually agreed that the carrier shall not be liable * * *

for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with a value therein expressed, and a special agreement is made."

The court held that the limitation was unreasonable because it clearly indicated a desire of the carrier to exempt itself altogether from liability for goods exceeding $100 in value per package, as against negligence. This we contend is just what the defendant intended to do in the case at bar, as against ordinary negligence, though not as against gross negligence.

The court below answered this contention by stating that "the federal courts recognize no difference between gross and ordinary negligence," citing *Railway Co. vs. Arms*, 91 U. S., 489. We answer: The carrier has made such a distinction and cannot be heard to say that none exists. In the *Arms* case it was decided merely that the distinction between gross and ordinary negligence was not sufficiently marked to warrant the adoption of a rule allowing exemplary or punitive damages where gross negligence was found by the jury.

As a matter of substantive law it would doubtless be inexpedient to endeavor to apply a concept so inexact as that of gross negligence. Here, however, we deal with the phrasing of a contract, not with principles of substantive law. It is the duty of the court to give that meaning to the terms of the contract which was intended by the express company which drew the contract.

In many States—of which New York, where the contract was made, is one—a distinction between gross and ordinary negligence is applied (see cases cited). The express companies doubtless drew the contract with reference to the decisions of those States which recognize the distinction. It should not be heard to assert that words of its own choosing are meaningless.

Nor is it just or reasonable to hold that a shipper dealing with the express company must determine whether or not the word "gross" is meaningless. One about to make a shipment might read the bill of lading, say to himself, "well, I probably never could *prove gross* negligence," and conclude that it was not worth while to "pay for valuation."

The only option that this court recognizes as reasonable is full, unrestricted, common law liability.

POINT III.

The limitation of liability, in the bill of lading, was prohibited by the Interstate Commerce Act, as a concession to the shipper, or variation from the posted and filed schedules of rates and charges of the defendant. The declaration of a false valuation is a violation of Section 10 of the Act.

In so far as the defendant's rates and charges can be gleaned from the evidence, they contemplate the charging of a rate according to value. If there is a value above fifty dollars, an addi-

tional charge is to be made. The actual value of the shipment was not declared by the shipper, but the carrier could have easily ascertained the approximate value.

By means of deliberate undervaluations, may a shipper obtain a lower rate than that which the real value of the shipment and proper care in its transportation demanded?

May a shipper and a carrier agree that for purposes of the shipment, the property shall have a fictitious valuation, only three-tenths of one per cent. of the real, known value, and thereby fix the rate at a lower figure than the schedules of the carrier require?

By the Interstate Commerce Act, "any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier * * * or whereby any other advantage is given or discrimination is practiced," is made illegal (Act of Feb. 19, 1903, Chap. 708, Sec. 1, as amended by Act of June 29, 1906, Chap. 3591, 34 Stat. at L. 584).

It is further provided by Section 10 of the original Interstate Commerce Act (Act of Feb. 4, 1887, Chap. 104, 24 Stat. at L. 382, Act of March 2, 1889, Chap. 382, Sec. 2, 25 Stat. at L. 857), as follows:

> "Any common carrier subject to the provisions of this Act * * * who, by means *of false billing*, false classification, false weighing, or false report of weight, *or by any*

> *other device or means, shall knowingly and wilfully assist,* or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be guilty of a misdemeanor * * *."

It would seem clear that billing goods at a false and fictitious valuation, far less than the true value, whereby a less rate than the rate prescribed is obtained, is prohibited as "false billing." The Interstate Commerce Commission has so held. It has ruled that negotiable bonds may not be transported under bills of lading naming a value less than the face value of the bonds, so as to reduce the rate.

See

Conference Rulings of the Commission, (published 1910), page 14, No. 58.

We quote the ruling of the Commission in full:

> "58. *Declaring a false valuation in violation of Section* 10.—Upon an inquiry from a banking house whether it may lawfully declare a value of $5,000 upon a package of negotiable bonds of the market value of $10,000 and pay the express charges on the basis of the declared value, upon the understanding that in case of the loss of the bonds the express company will be responsible only for the amount so declared, it was held that a shipper falsely declaring the value of a package delivered to an express company for transportation violates section 10 of the act."

No offense against the act to regulate commerce was here consummated. The shipper did, it is true, decline to "declare valuation," and did accept a bill of lading showing no valuation except fifty dollars, knowing that the actual valuation was far greater, and that the carrier charged "for valuation." But no rate was ever agreed upon or paid and the carrier was at liberty to charge whatever rate was required by law.

Even if the offense had been consummated, it would not bar a recovery, as this court twenty years ago expressly held in *Merchants' C. P. & S. Co. vs. Ins. Co.*, 151 U. S., 368, 388.

Should this Court sustain this false valuation or false billing, however, it would thereby consent to a violation of the Interstate Commerce Act.

The practice of knowing and deliberate undervaluation amounts, we submit, to the giving of a concession.

In the case at bar there was, as we have seen, no agreed rate. It was the duty of the carrier, since it was able so to do, to determine the true valuation of the shipment and make a charge accordingly. Knowing that the valuation of fifty dollars was not the true valuation, the carrier had no right to carry the shipment at the rate applicable to a shipment worth fifty dollars.

The contention of the court below that there was no discrimination because it was open to all to undervalue shipments, is met by the opinions of Mr. Justice Lurton in the *Carl* and *Harriman* cases, which we have discussed under Point I. If there are two rates, higher and lower, according to value, it is the duty of the carrier to charge

according to the value; and it makes no difference whether the carrier's knowledge of the value of the shipment comes from a declaration by the shipper, or from observation.

POINT IV.

The inadvertent statement of the agent of the shipper that the goods were insured does not create an estoppel.

If it be argued that but for this statement the carrier would have protected itself by obtaining insurance, a complete answer is found in the fact that any insurance company protecting the shipper would have been subrogated to the shipper's right of action against the carrier. It was of no concern to the carrier, therefore, whether the shipper was insured or not.

Liverpool and Great Western Steam Co. vs. Phoenix Ins. Co., 129 U. S., 397.

The bill of lading contains no provision that any insurance taken by the shipper shall inure to the benefit of the carrier.

POINT V.

The bill of lading did not in any way limit the liability of the carrier for conversion or intentional breach of the contract to deliver. It having appeared that salvage existed after the fire, which the carrier failed to deliver, the exact amount of such salvage being known to the carrier but unascertainable by the shipper, the plaintiff should be allowed to recover.

The plaintiff specifically asked to go to the jury on this point (fol. 86, Assignment of Error Number IX).

The bill of lading provides in part:

> "Nor shall said Company be liable *for any loss of or damage to said property* in any event or for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said Company or its servants; nor in any event shall said Company be held liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued, unless a different value is hereinabove stated."

In the "fifty dollar clause" the limitation plainly refers to liability *for loss or damage.*

But in this case the salvage was not lost. For some unexplained reason, the metal frames of the automobiles, which remained after the fire, were not delivered to the consignee or to the owner. They were simply converted to the use of the defendant. There was as to the salvage an intentional breach of the contract to deliver.

Bills of lading are to be construed against the carrier which prepares them.

Texas & Pac. Ry. Co. vs. Reiss, 183 U. S., 621.

Same vs. Callender, 183 U. S., 632.

London Assur. Co. vs Companhia, etc., 167 U. S., 149, 159.

Compania, etc., vs. Brauer, 168 U. S., 104.

The Caledonia, 157 U. S., 124.

The Queen of the Pacific, 180 U. S., 49, 52.

If the carrier had intended to limit its liability for conversion, or breach of the contract to deliver not caused by the loss or destruction of the shipment, to fifty dollars, it should have so provided in distinct terms.

Cases cited.
Michigan C. R. R. Co. vs. Mineral Springs Mfg. Co., 16 Wall., 318.
Phoenix Ins. Co. vs. Erie & W. In. Co., 117 U. S., 312.

Inasmuch as the jury could find that there was a wilful and intentional failure to deliver the salvage, greater than mere negligence, the limitations of the bill of lading do not apply; and the carrier must respond for the full value of the shipment, as it is not within the power of the shipper to prove the value of the undestroyed portion.

Shelton vs. Can. Nor. Ry. Co., 189 Fed., 153.
Hutchinson on Carriers, Sec. 432.
Rosenthal vs. Weir, 170 N. Y., 148.
Magnin vs. Dinsmore, 70 N. Y., 410.
Railway Co. vs. Sloat, 93 Ga., 803.
Railway Co. vs. Johnson, King & Co., 121 Ga., 231.

No demand was necessary, because an express carrier, unlike a freight carrier, agrees to make personal delivery.

Hutchinson on Carriers, Sec. 716, and cases cited.

FINALLY.

The judgment appealed from should be reversed and the court below directed to enter judgment in favor of the plaintiff for the stipulated value of the shipment, $15,487.06, with interest from the 7th day of May, 1907.

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